

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

118816

FILE: B-205970 DATE: June 28, 1982
MATTER OF: Continental Water Systems Corporation

DIGEST:

1. Offeror which chose to respond to solicitation for only certain items is an "interested party" to protest award of contracts only as to those items.
2. Protest alleging that solicitation was ambiguous is untimely since that alleged defect was apparent on the face of the solicitation yet the protest was not filed until the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1).
3. Protest alleging that agency improperly awarded contracts on f.o.b. origin basis is untimely where protester did not file protest within 10 working days of receiving notice of criteria used by agency in making awards, but will be considered because it raises question central to how Federal Supply Schedule contracts are awarded.
4. General Services Administration is not required to evaluate delivery costs when offers for multiple-award Federal Supply Schedule contracts are made on f.o.b. origin basis since such costs can only be evaluated by ordering agencies at time of placing order against Schedule contract.

Continental Water Systems Corporation protests the award of multiple-award Federal Supply Schedule (FSS) contracts for water purification equipment under solicitation No. 7CF-52074/S4/7FC issued by the General Services Administration (GSA). GSA has awarded 26 contracts under this solicitation, thirteen of which were made on an f.o.b. origin basis. Continental alleges that the awards made on an f.o.b. origin basis were improper and that the solicitation was ambiguous. We dismiss the protest in part and deny it in part.

Continental alleges that the awards made on an f.o.b. origin basis are "illegal" because in evaluating these offers the contracting officer did not take into account quantity, shipping weight, shipping rates, source of shipment, and destination. Continental argues that since the contracting officer did not know this information concerning the cost of shipping the items, he could not determine whether an f.o.b. origin offer was more advantageous to the Government than an f.o.b. destination offer. Continental also claims that the solicitation was ambiguous, because one clause in the solicitation provides that prices must cover delivery to the destination while another clause requests f.o.b. origin prices.

GSA notes that Continental did not submit an offer on the items involved in eight of the thirteen contracts which it is protesting and argues that as to those contracts Continental is not an "interested party" qualified to protest under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1982).

The submission of a proposal is not necessarily required in order for a protester to qualify as an interested party. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and whether these circumstances indicate the existence of a direct and/or substantial economic interest on the part of the protester. Cardion Electronics, 58 Comp. Gen. 591 (1979), 79-1 CPD 406.

The direct and substantial economic interests at stake here are those of the offerors who responded to the solicitation for these items and did not receive award. Continental did not submit offers for these eight items and there is no indication that Continental was precluded by the solicitation specifications from submitting an offer on these items. Thus, assuming Continental's allegations are true, the unsuccessful offerors were the ones who were harmed and they would have been the appropriate parties to file a protest on these eight contracts with this Office. See Cullinane Corporation, B-201132, January 27, 1981, 81-1 CPD 48; cf. Fred Anderson, B-196025, February 11,

1980, 80-1 CPD 120 (protester was interested party where alleged that specifications precluded it from preparing bid). However, as an unsuccessful offeror on the other five contracts, Continental is an interested party capable of pursuing this protest as to those contracts.

To the extent that Continental alleges that the solicitation is ambiguous, the protest is untimely. Our Procedures require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(b)(1). The alleged ambiguity, which involves two clauses in the solicitation, is readily apparent from the face of the solicitation. Although the closing date for the receipt of proposals was August 26, the protest was not filed until December 30, more than four months after the closing date. Accordingly, the allegation that the solicitation is ambiguous is untimely and will not be considered on the merits. See R. E. White and Associates, Inc., B-202677, B-202877, August 12, 1981, 81-2 CPD 130.

Continental's allegation that the award of the contracts on an f.o.b. origin basis was improper is also untimely. Our Procedures require that a protest be filed within 10 working days of when the basis for protest is known. 4 C.F.R. § 21.2(b)(2). By letter of November 25, GSA advised Continental of the criteria used in making awards and informed the firm that f.o.b. point was not a determinative factor. Continental did not file its protest here, however, until December 30. Nonetheless, because this issue involves a fundamental aspect of how FSS contracts are awarded, we will consider the matter.

FSS multiple-award contracts, unlike other Government procurement contracts, do not give rise to an immediate obligation on the part of the contractor to perform and are not awarded on the basis of overall lowest evaluated cost. They are used to simplify purchasing of commonly used items by individual Government agencies, see Federal Property Management Regulations (FPMR) § 101-26.402-1, 41 C.F.R. § 101-26.402-1 (1981), and give rise to

actual contractor performance obligations only upon acceptance of delivery orders issued by Government agencies against specific FSS contracts. The agencies are responsible for identifying and ordering the lowest cost item meeting their needs that is available from FSS contracts, unless they can justify ordering a more costly item. In determining cost, the agencies are also responsible for evaluating delivery costs, if any. FPMR §§ 101-26.408-2, 101-26.408-4. GSA, in awarding the FSS contracts, does not and is not required to consider delivery costs, since such costs will vary depending upon the desired delivery point for each order. Obviously, since deliveries might be required anywhere in the country, it would not be possible for GSA to evaluate f.o.b. origin offers with respect to delivery costs when considering whether those offers are advantageous to the Government. Instead, and as the solicitation itself indicated, FSS contracts are awarded on the basis of discounts from vendors' established prices.

What GSA did here was consistent with its standard practice. It received and evaluated offers on both an f.o.b. origin and f.o.b. destination basis, and awarded several contracts on the basis of offered discounts. In so doing, it violated no law or regulation. The ultimate determination of which vendor's item can be furnished to an agency at the lowest overall cost, including delivery, must be made by the agency at the time of ordering. Thus, the evaluation that the protester seeks in effect will be made, but at the time when it is practicable to do so.

The protest is denied in part and dismissed in part.

for Harry R. Van Cleave.
Comptroller General
of the United States